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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 603

KENNETH D. ENGLAND and
CONNIE J. ENGLAND,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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KENNETH D. ENGLAND and CONNIE J. ENGLAND,
Petitioners,

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UNITED STATES OF AMERICA,
Respondent.

No.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (R. 39-43) is reported at 345 F. 2d 414 (7th Cir. 1965) and is reprinted in Appendix A, *infra,* pp. 1a-7a.* The opinion of the

*References to "R." are to the certified transcript of the record in this case, which includes the printed Appendices to Respondent's and Petitioners' briefs in the Court of Appeals. Because the Clerk of the Court of Appeals did not exclude from the record the briefs on appeal and did not paginate the record, counsel for petitioners have paginated the record in this case as follows: Appendix A to Respondent's Brief is numbered R. 1-3; Appendix B to Respondent's Brief is numbered R. 4-32; the Appendix to Petitioners' Brief is numbered R. 33-38; and the opinion and judgment of the Court of Appeals is numbered R. 39-43. For the convenience of the Court, we have filed nine additional copies of the Appendices to the briefs on appeal, the pages of which have been numbered the same as the corresponding portion of the certified transcript.

United States District Court for the Southern District of Illinois (R. 12-30) is reported at 226 F. Supp. 762 (S. D. Ill. 1964) and is reprinted in Appendix B, *infra,* pp. 1b-21b.

JURISDICTION

The judgment of the Court of Appeals (Appendix A, *infra,* p. 7a) was entered on April 29, 1965 (R. 43). By order of Mr. Justice Clark, entered July 14, 1965, the time for filing this Petition for a Writ of Certiorari was extended to and including September 24, 1965. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED

Whether an employee who is transferred to a new job location by and at the direction of his employer must include in gross income amounts received from his employer in reimbursement for extraordinary moving expenses necessarily incurred by the employee solely as a result of his job transfer. Alternatively, if the employee must include such reimbursed expenses in gross income, whether the employee is entitled to deduct such expenses as ordinary and necessary business expenses.

STATUTES AND REGULATIONS INVOLVED

The statute involved with respect to the includibility in income of the reimbursed expenses is section 61(a) of the Internal Revenue Code of 1954, 26 U. S. C. § 61(a), which provides in pertinent part:

> "SEC. 61. GROSS INCOME DEFINED.
>
> "(a) GENERAL DEFINITION.—Except as otherwise provided in this subtitle, gross income means

all income from whatever source derived, including (but not limited to) the following items:

> "(1) Compensation for services, including fees, commissions, and similar items; . . ."

There are no regulations directly applicable to the issue here presented under section 61(a).*

The statute involved with respect to the alternative question of the deductibility of the employee's expenses if the reimbursement is includible in income is section 162(a) of the Internal Revenue Code of 1954, 26 U. S. C. § 162(a), which provides in pertinent part:

> "SEC. 162. TRADE OR BUSINESS EXPENSES.
>
> "(a) IN GENERAL.—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—
>
> * * *
>
> "(2) traveling expenses (including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances) while away from home in the pursuit of a trade or business; . . ."

There are no regulations directly applicable to the issue here presented under section 162(a).

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*All section references are to the Internal Revenue Code of 1954.

STATEMENT OF THE CASE

The material facts in this case are undisputed and are as follows:

For seven years prior to May 19, 1960, petitioner Kenneth D. England* was employed by The Aetna Casualty and Surety Company (the "Company") at its Kansas City, Missouri, office, and resided in that city with his wife in a home owned by them (R. 12). On May 19, 1960, England was advised by the Company that, effective June 1, 1960, he was being permanently transferred to its Springfield, Illinois, office, but on his request he was allowed some additional time before the transfer (R. 12-13, 39-40). England in fact arrived in Springfield on June 19, 1960, and took up his new duties on June 20, 1960 (R. 13). England then commenced looking for a permanent place to live with his family in the Springfield, Illinois, area and on July 9, 1960, he leased a house which was unavailable for occupancy until August 1, 1960, at which time England and his family moved in (R. 13-14, 39-40).

Between June 19 and August 1, 1960, England incurred expenses of $446 for which he was reimbursed by the Company under its written program covering reimbursement of transferred employees for moving, traveling and duplicated living expenses (R. 14). A copy of such written program was appended to the District Court opinion (R. 26-30) and appears in Appendix B, *infra,* at pp. 17b-21b. The principal items for which England was reimbursed by the Company were for his food and lodging expenses in

*Petitioner Connie J. England is the wife of Kenneth D. England and is a petitioner in this case only because she and her husband filed a joint return for the taxable year in issue. References to England refer to petitioner Kenneth D. England only.

Springfield, Illinois, during the period his family remained in Kansas City prior to their occupancy of permanent living quarters at the new location and for the cost of a trip to Springfield by England's wife to inspect and select among houses available for permanent living quarters (R. 14-15 fn. 1).* The Company also bore the expense of moving England's household effects and the cost of his wife's transportation at the time of the permanent move, but under the rules set forth in Rev. Rul. 54-429, 1954-2 C. B. 53, the Government did not contend that reimbursement for such items constituted income to England (R. 16-17, fn. 2).

The Company's reimbursement program was not to compensate for services rendered, but was designed to prevent or reduce financial loss sustained by transferred employees because of traveling and duplicated living expenses arising from their transfer (R. 20). All of the expenses for which the Company reimbursed England were of an extraordinary nature required to be incurred by the Company (R. 23). Petitioners suffered an actual financial loss as a result of the transfer and their net worth showed a decrease in 1960 because of the transfer (R. 20).

In their 1960 income tax return, petitioners did not include in income any portion of the $446 reimbursed to England by the Company. After audit of such return, the Commissioner of Internal Revenue increased petitioners' taxable income by said $446, resulting in an additional tax for 1960 of $103. Petitioners paid the additional tax, filed a claim for refund which was rejected and thereupon filed

*Such principal items aggregated more than $400. Other expenses, such as for laundry, a newspaper advertisement to rent a house and incidental costs involved in the sale of his Kansas City house, increased the amount for which England claimed reimbursement from the Company to $494.60. The Company allowed reimbursement for $452.83, and the parties have agreed that $446 should be regarded as such reimbursement for the purposes of this case (R. 14-15, fn. 1).

suit for refund in the District Court for the Southern District of Illinois (R. 40). The jurisdiction of District Court was founded on 28 U. S. C. § 1346(a)(1). The District Court held that the $446 for which England was reimbursed was not includible in income and entered judgment for petitioners (R. 12-31). The Court of Appeals reversed (R. 39-43).

REASONS FOR GRANTING THE WRIT

I. The Question Affects Tens of Thousands of Taxpayers Annually.

More than 150,000 employees were transferred within the United States by their corporate employers during 1964, and it is likely that the number of transfers will increase in 1965 and future years.[1] The expanding volume of employee transfers has resulted from the expansion and decentralization of American industry since the end of World War II, with the concomitant need to staff new plants or fill vacancies at distant locations.[2]

Recognizing that substantial costs are involved in the moving of a household, virtually all companies bear or reimburse the employee for part or all of the extraordinary expenses necessarily incurred in connection with his job transfer. Employers do not bear such costs to compensate their employees. Indeed, officials of the two principal employment divisions of the Government have so stated. The Assistant Secretary of Defense, Mr. Norman S. Paul, has advised the Internal Revenue Service that dislocation allowances paid to transferred military personnel to cover temporary

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[1]See *Closeup: Management's Moving Man,* Chemical Week, May 22, 1965, p. 87.

[2]See *"We've Been Transferred,"* Fortune, July 1957, p. 116; *Americans on the Move to New Jobs, New Places,* Life, Feb. 3, 1958, p. 85.

living costs are "not intended to be compensatory."[3] Similarly, the Chairman of the United States Civil Service Commission, Mr. John W. Macy, Jr., observed in a letter to the Speaker of the House of Representatives in support of legislation authorizing reimbursement to transferred Civil Service employees of expenses such as were reimbursed to England that such expenses should be reimbursed by the employer because the employer "rather than the employee is both the initiator and the prime beneficiary of the move."[4]

The Internal Revenue Service (the "Service") has also partially recognized the true nature of such reimbursements, holding in a 1954 ruling that employer reimbursement to an employee "for moving himself, his immediate family, household goods and personal effects, in case of a transfer in the interest of his employer," does not constitute compensation and is not includible in gross income under the 1939 Code predecessor provision of section 61(a) because such reimbursement "is not compensatory in nature."[5] On the other hand, as a result of the decision below the Service has held that reimbursements for other expenses incurred as a result of the employer-directed move, including those for which England was reimbursed, are includible in gross income and are subject to withholding.[6] As we hereinafter show, the position of the Service in its recent ruling is contrary to the position of the Tax Court (*John E. Cavanagh*, 36 T. C. 300 (1961)) and may irrevocably prejudice tens of thousands of taxpayers.

[3]Letter from Norman S. Paul, Assistant Secretary of Defense for Manpower, to Bertrand M. Harding, Acting Commissioner of Internal Revenue, reported in Bureau of National Affairs, *Daily Report for Executives, Developments Affecting Taxation and Finance*, No. 169, p. G-1 (August 28, 1964).

[4]Letter from John W. Macy, Jr., Chairman of the United States Civil Service Commission, to the Honorable John W. McCormack, Speaker of the House of Representatives, dated May 20, 1965.

[5]Rev. Rul. 54-429, 1954-2 C. B. 53.

[6]Rev. Rul. 65-158, I. R. B. 1965-24, 6.

Although the expenses which companies will bear vary, the vast majority of employers reimburse employees transferred at the employer's behest for temporary food and lodging costs of the type incurred by England and for the cost of permitting the employee's wife to select a new home. A 1964 survey by the American Management Association covering 256 of the largest companies in the country revealed that 223 firms, or 87 percent of the total, reimbursed transferred employees for temporary food and lodging expenses of the type for which England was reimbursed.[7] Earlier studies by the National Industrial Conference Board[8] (involving 151 companies) and Greyvan Lines Incorporated[9] (involving 688 companies) likewise indicated that between 80 percent and 87 percent of all companies reimburse transferred employees for such temporary duplicated living expenses. The studies further reveal that most companies also reimburse the transferred employee for a house selection trip such as England's wife made.

On the basis of these figures, it seems fair to estimate that the question of includibility in income of the reimbursed expenses involved in this case affects the income tax liability of at least 50,000 and perhaps more than 100,000 of the 150,000 employees annually transferred by private industry.[10] In addition, the question also affects approximately 340,000 military personnel who are transferred an-

[7]American Management Association Research Study 67, *Reimbursing Personnel for Transfer and Relocation Costs* (1964).

[8]National Industrial Conference Board, Inc., Studies in Personnel Policy, No. 154, *Company Payment of Employees' Moving Expenses* (1956).

[9]Greyvan Lines Incorporated, *What Other Companies Do and What Their Employees Think They Should Do* (1957).

[10]Although there are no figures available to indicate the percentage of transferred employees who incur costs for temporary food and lodging expenses or for a house selection trip, it appears likely from the relative uniformity of company reimbursement policies that the overwhelming majority of transferred employees do incur such costs.

nually and receive dislocation allowances.[11] Finally, if the legislation now pending[12] before the Congress for reimbursement to transferred Civil Service employees of the type of expenses here involved is enacted, as seems likely,[13] another 35,000 Civil Service employees will be annually affected by the outcome of this case.[14] As the Government advised the Court of Appeals below, the issue here presented affects "the rights of thousands of taxpayers" and "is an extremely important one."[15]

Not only are many thousands of taxpayers annually affected by the employee transfer expense issue here involved; a good number of them may be irrevocably prejudiced by the action which the Service has taken following the Court of Appeals decision below. On June 14, 1965, the Service in reliance on the Court of Appeals decision below published a ruling requiring employers to withhold income tax on reimbursements of expenses of the type here involved.[16] The ruling wholly ignores the Tax Court deci-

[11]Letter from Norman S. Paul, Assistant Secretary of Defense for Manpower, to Bertrand M. Harding, Acting Commissioner of Internal Revenue, reported in Bureau of National Affairs, *Daily Report for Executives, Developments Affecting Taxation and Finance*, No. 243, p. G-1 (December 15, 1964).

[12]H. R. 10607, 89th Cong., 1st Sess. (1965).

[13]The bill was recommended by the President. See Message from the President of the United States, May 12, 1965, 111 *Cong. Rec.* 9884 (1965) (H. Doc. No. 170, 89th Cong., 1st Sess.).

[14]John W. Macy, Jr., Chairman of the United States Civil Service Commission, *Hearings Before the Subcommittee on Executive and Legislative Reorganization of the House Committee on Government Operations on H. R. 10607*, 89th Cong., 1st Sess., stenographic transcript, p. 23 (Sept. 1, 1965).

[15]Brief for Appellant United States of America in the Court of Appeals for the Seventh Circuit, p. 8.

[16]Rev. Rul. 65-158, I. R. B. 1965-24, 6. Apparently dissatisfied with compliance with the ruling, the Service on August 9, 1965, issued Technical Information Release 754 reminding "employers that certain moving expense reimbursements or allowances they pay to or on behalf of employees transferred primarily in the employer's interest are subject to withholding of employment taxes." See Announcement 65-65, I. R. B. 1965-36, 14.

sion in *John E. Cavanagh,* 36 T. C. 300 (1961), the only other decision expressly considering the issue, which ruled that such reimbursements were not includible in income.[17]

It is clear that most employees who receive a W-2 Form reflecting such reimbursed expenses as income will never know that the includibility of such reimbursements in income is an open issue which they may question.[18] A survey by counsel for petitioners of the 1964 experience of ten companies with 515,000 employees showed that of 3,714 employees who were transferred, 2,345 (63.1%) earned under $10,000 and 3,447 (92.8%) earned under $15,000.[19] Employees at such income levels generally have no knowledge of refined tax issues and few can afford or obtain the services of tax experts.

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[17]The Government did not appeal the *Cavanagh* decision, but nevertheless refuses to follow it. 1962-2 C. B. 6. Subsequent to the Court of Appeals decision in this case, District Judge Poos who had decided this case decided a similar case, *Logan* v. *United States,* 65-2 U. S. Tax Cas. ¶ 9554 (S. D. Ill. 1965), in favor of the Government because his decision was "controlled by *England* v. *United States. . . .*" On July 26, 1965, Judge Poos vacated and set aside the judgment in the *Logan* case upon being advised that petitioners in this case intended to seek Supreme Court review. 65-2 U. S. Tax Cas. ¶ 9608. Judge Poos reasoned that since the *Logan* case involved the same issues as the *England* case, if the Supreme Court should reverse the Court of Appeals in *England,* the *Logan* case would not have to be appealed.

[18]This is the more so since the instructions which accompanied the 1964 individual income tax returns (U. S. Treasury Department, Internal Revenue Service Form 3903) and *Your Federal Income Tax* (U. S. Treasury Department, Internal Revenue Service Publication No. 17, p. 46 (1965 ed.)), an official Treasury Department publication for the guidance of taxpayers, unqualifiedly state that such reimbursements must be included in income.

[19]A witness before the Senate Finance Committee in 1963 testified that 85 percent of employees reimbursed for moving expenses by one large corporation and 91 percent of those of another earned less than $15,000 a year. Almost none of the other employees transferred by these two corporations earned more than $25,000 a year. Statement of Richard B. Barker, *Hearings Before the Senate Committee on Finance on H. R. 8363,* 88th Cong., 1st Sess. (1963) Part 4, p. 2008.

Thus, not only will each year's delay in the establishment of governing rules mean that the statute of limitations will have run on the refund rights of tens of thousands of taxpayers, the failure promptly to establish such rules presents an unusual and more troublesome problem: even if the rules developed several years hence exclude from income reimbursements such as England's, most of the many thousands of taxpayers who will have paid their taxes unaware of the issue and who still are entitled to refunds will not be in a position even to learn of these rules, or having learned of them, will be unaware of their application to themselves.

Furthermore, of the minority of taxpayers who may be aware of the questionable nature of the Service's position, few will have any practical remedy until the governing rules are finally established by this Court. The amount of expenses reimbursed to a single employee and asserted by the Service to be includible in his income is generally modest. So also generally is his income tax bracket. Thus, the amount of tax involved in the usual case is not more than a few hundred dollars—the $103 involved here is typical.[20] Consequently, the amount at stake, while important to the ordinary taxpayer, is not sufficient to warrant the cost of his challenging the Service in the courts. Only if the employer is willing to bear the costs of litigation—as the Company is doing here because of the importance of the case—is the typical employee in a position to challenge the Service.

The issue presented here is of continuing importance for current and future taxable years and is in no way

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[20]It may also be noted, as illustrative, that income tax deficiencies arising from reimbursed moving expenses have been assessed against 229 employees who were transferred from Chicago, Illinois to Springfield, Illinois by Illinois Bell Telephone Company in connection with the relocation of an entire department. Over 80 percent of those 229 employees received annual wages of less than $12,000.

affected by the addition to the Internal Revenue Code, by the Revenue Act of 1964, of a new section 217, dealing with moving expenses. Such section provides for a deduction for reimbursed moving expenses of new employees and non-reimbursed moving expenses of all employees to the extent that the Internal Revenue Service had previously held that the reimbursement to an existing employee was not includible in income. In adopting the new statutory provision, the Congress expressly noted the existence of the Tax Court decision in *Cavanagh* and stated that the enactment of section 217 was not meant to imply that "moving expense exclusions under existing law are necessarily limited" to the categories covered by section 217. "The question of whether the exclusion for existing employees extends beyond these three categories is left for judicial interpretation."[21]

The time for such judicial interpretation on a final, national basis is now. It is now because of the conflict between the Tax Court and the Seventh Circuit. It is now because tens of thousands of taxpayers annually are affected by the tax question here in issue. And, most important, it is now because enforcement of the Service's income tax withholding policy will mean that many thousands, unaware of and unable to preserve their rights, will inevitably and irrevocably pay taxes that may ultimately prove not to have been due.

II. The Decision of the Court of Appeals Is in Conflict With the Decision of the Tax Court and is Contrary to Established Rules for Determining Whether Reimbursed Expenses Constitute Income.

The District Court in this case found that the $446 of expenses for which England was reimbursed "were of an

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[21] S. Rep. No. 830, 88th Cong., 2d Sess. 71-72 (1964); H. R. Rep. No. 749, 88th Cong., 1st Sess. 59 (1963).

extraordinary nature required to be incurred by the employer" (R. 23), that the Company did not intend the reimbursement to be compensatory (R. 20), and that as a result the expenses "were the employer's costs and not the employees" (R. 23). So finding, the District Court held that the reimbursement to England for such expenses did not constitute income.

The District Court discussed at length and agreed with the reasoning and result in *John E. Cavanagh,*[22] where the Tax Court, in a decision reviewed by the entire Court, held that the reimbursement of a transferred employee for the extraordinary costs of food and lodging incurred while he and his family were awaiting arrival of their household effects at his new job location was not includible in income. The Tax Court felt that the fact that ordinary food and lodging costs might be characterized as non-deductible personal living expenses was irrelevant if the reimbursed extraordinary expenses were initially incurred and paid on behalf of the employer. Such characterization, the Tax Court said, "has no applicability to such expenses properly chargeable to another which the taxpayer pays and for which he is reimbursed."[23]

So reasoning, the Tax Court viewed the question of includibility in income of the reimbursed expenses as entirely dependent on the facts of the case. The Court there found "the agreed facts to be that petitioner actually expended $280 in extraordinary living costs"[24] for which he was reimbursed and the further fact that the transfer "was not only for the convenience of his then employer, but specifically directed and required by it."[25] Having thus found that Cavanagh's extraordinary expenses were required to

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[22]36 T. C. 300 (1961), *nonacq.,* 1962-2 C. B. 6.
[23]36 T. C. at 304.
[24]36 T. C. at 302.
[25]36 T. C. at 303.

be incurred by his employer, the Tax Court concluded that their reimbursement did not constitute income to Cavanagh.

The Court of Appeals below disagreed with the factual approach to the issue taken by the District Court below and by the Tax Court in *Cavanagh,* stating that *Cavanagh* "was wrongly decided," that the meals and lodging expenses for which England was reimbursed were "personal living expenses of the employee," and that on their reimbursement "income is realized thereby" (R. 41). The Court of Appeals did not regard the issue before it as requiring application of factual criteria to determine whether the reimbursement constituted income. It paid no attention to and made no inquiry about the findings of fact of the District Court. The Court of Appeals held that an employer's reimbursement of such expenses to a transferred employee constituted income, apparently as a matter of law, even though the reimbursed expenses were found by the District Court to have been extraordinary in nature, to have been incurred only because of a job transfer directed by the Company and not to have been intended by the Company to be compensatory.

The holding of the Court of Appeals is, of course, contrary to *Cavanagh.* More important, it is contrary to the general proposition, recently reaffirmed by this Court in *Rudolph* v. *United States,*[26] that the question of whether an employer's reimbursement of expenses paid by an employee constitutes income is predominantly a question of fact. It is also contrary to the existing ruling precedents in the moving expense area.[27]

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[26]370 U. S. 269 (1962).

[27]The Court of Appeals cited *Cockrell* v. *Commissioner,* 321 F. 2d 504 (8th Cir. 1963), as supporting its view. In *Cockrell,* the transferred employee in 1956 received a special allowance for two months while living with his family in a motel at his new job location. Prior to 1957, the employee and his family moved into a rented house and the employer then paid him a $70 a week living expense allowance. Only 1957 and 1958, involving the $70 a week allowance and not the motel reimbursement, were before the Court, and the case was argued

In Rev. Rul. 54-429,[28] the Internal Revenue Service ruled that gross income does not include amounts received by a transferred employee in reimbursement for household moving expenses and the cost of transporting the employee and his family to the new job location (including meals and lodging en route). The theory of the ruling is that if the move is "primarily for the benefit of the employer," reimbursement of such expenses "is not compensatory in nature."[29] By the same token, reimbursement of other extraordinary expenses that would not have been incurred but for an employer-directed move should not be includible in income if found to be not compensatory in nature.

Such, indeed, was the holding of Rev. Rul. 63-258, 1963-2 C. B. 22, where the Service ruled that special allowances paid by the Government to civilian and military personnel to cover the costs of travel to a "safehaven post" and for subsistence for a period of up to 180 days, following evacuation from Cuba, were not includible in income. The Service reasoned that since the allowances "are solely intended to offset the direct added expenses which would not have been incurred except for the evacuation, it is apparent that such payments were not intended to be compensatory in nature."

In sum, under the rules of *Rudolph, Cavanagh,* and existing ruling precedents in the moving expense area, the Court of Appeals below should have been concerned only with the determination of whether the District Court employed the proper factual criteria and whether the District

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and decided on the question of whether the employee's assignment was temporary or permanent. The *Cockrell* case has no bearing on the reimbursement issue here involved.

[28] 1954-2 C. B. 53.

[29] The ruling also held that "reimbursements for meals and lodgings of the employee and his family while awaiting permanent quarters at the new post of duty are includible in gross income of the employee." It does not appear whether the food and lodging costs dealt with by the ruling were normal or extraordinary costs so far as the employee was concerned.

Court's findings of fact with respect thereto were "clearly erroneous." *Cf. Commissioner* v. *Duberstein*, 363 U. S. 278 (1960). In treating the issue before it as entirely a matter of law, the Court of Appeals below committed error.

Because of the widespread importance of the tax treatment of reimbursed expenses to transferred employees, it is essential that this Court resolve the uncertainties created by the decision below.

III. The Decision of the Court of Appeals Is in Conflict With Decisions of the Courts of Appeals for the Sixth and Ninth Circuits on the Meaning of the Taxpayer's "Home".

After holding that England's $446 reimbursement was includible in his income, the Court of Appeals below also rejected England's right to deduct part or all of the expenses for which he was reimbursed as travel expenses while away from home under section 162(a)(2), holding that a taxpayer's "home" for purposes of that section "is the place of taxpayer's business. In this case Springfield clearly was England's 'home' after the transfer. . . ." (R. 42). This conclusion of the Court of Appeals is in agreement with the interpretation of "home" by the Court of Appeals for the Fourth Circuit.[30] On the other hand, the Courts of Appeals for the Sixth[31] and Ninth Circuits[32] have held that "home" is not synonymous with "business situs" and that a taxpayer's place of business may be "away from home."[33]

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[30] *Bercaw* v. *Commissioner*, 165 F. 2d 521 (4th Cir. 1948); *Barnhill* v. *Commissioner*, 148 F. 2d 913 (4th Cir. 1945).

[31] *Burns* v. *Gray*, 287 F. 2d 698 (6th Cir. 1961).

[32] *Wright* v. *Hartsell*, 305 F. 2d 221 (9th Cir. 1962); *Wallace* v. *Commissioner*, 144 F. 2d 407 (9th Cir. 1944).

[33] The Court of Appeals for the Fifth Circuit took the same view in *Flowers* v. *Commissioner*, 148 F. 2d 163 (5th Cir. 1945), *rev'd on diff. issue*, 326 U. S. 465 (1946) and *United States* v. *LeBlanc*, 278 F. 2d 571 (5th Cir. 1960). The present position of that Court is not clear, however. See *Light* v. *Commissioner*, 310 F. 2d 716 (5th Cir. 1962).

Twenty years ago the Solicitor General of the United States advised this Court that "resolution of the conflict is of considerable importance" because the question "arises frequently in the collection of income taxes and affects the recovery of substantial amounts of revenue."[34] Although this Court has twice taken cases involving the interpretation of "home" in the Courts below, the Court disposed of both without reaching that question. *Peurifoy* v. *Commissioner,* 358 U. S. 59 (1958); *Commissioner* v. *Flowers,* 326 U. S. 465 (1946). In the meantime, the conflict and confusion among the Courts of Appeal have increased, and the increasing mobility of American labor has made the issue even more prevalent. Only this Court can finally resolve the question of whether "home" as used in section 162(a)(2) necessarily means the taxpayer's business situs.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 23, 1965

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[34] Petition for Writ of Certiorari, pp. 8, 9, *Commissioner* v. *Flowers,* 326 U. S. 465 (1946).

APPENDICES

APPENDIX A

Opinion of The Court of Appeals

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

September Term, 1964—September Session, 1964

No. 14727

Decided, April 29, 1965

KENNETH D. ENGLAND AND CONNIE J. ENGLAND,
Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA,
Defendant-Appellant.

BEFORE:

CASTLE, KILEY AND SWYGERT,
Circuit Judges

KILEY, Circuit Judge:

This appeal by the Government from a judgment for a refund to plaintiffs[1] of income tax poses the issue whether England, taxpayer, must include in his gross income for

[1]Connie J. England is also a plaintiff in this case since she and her husband filed a joint return for the taxable year in question.

1960 an amount which he was reimbursed by his employer for certain expenses incurred, prior to gaining possession of new permanent quarters, incidental to a transfer to a new post in the employer's interest; or alternatively, whether such amount, if includible in gross income, is a deductible travel or business expense. We think the district court erred in deciding this issue in favor of England.

The facts are undisputed. England was permanently transferred by his employer from Kansas City, Missouri, to Springfield, Illinois, where he arrived on June 19, 1960. He began then to look for a place for his family to live and on July 9, 1960 leased a house which was unavailable for occupancy until August 1, 1960, at which time his family moved in. Pursuant to its policy and regulations, the employer reimbursed England for $466.00 [*sic*] of his Springfield expenses incurred prior to taking possession under the lease. The major items of expense were his meals and lodging and a trip by his wife to inspect a house in Springfield.[2] England did not request or wish to make the transfer but did so at the behest of the employer.

The Commissioner of Internal Revenue added the amount of reimbursement to the taxpayer's gross income and assessed an additional tax of $103.00. England paid the tax under protest, and brought this suit after the Government rejected his demand for a refund.

We agree with the Government, contrary to the district court's view, that in view of § 61(a)'s definition of gross income as "all income from whatever source derived, including (but not limited to) the following items," the fact

[2]Other items included laundry and cleaning expense, boarding of taxpayer's dog and cat, and the cost of a title search, revenue stamps, newspaper advertisement, and telegram in connection with the sale of taxpayer's house in Kansas City.

that the reimbursement received by England might not fall within item (1) "Compensation for services, including fees, commissions, and similar items" is not in any way controlling. Nor is the fact, emphasized by the court, that England suffered a financial loss in the transfer to Springfield controlling as to whether the reimbursement constitutes gross income. We disagree, for reasons which will be clear hereafter, with the court's conclusion that congressional intent was that England's reimbursement should be excludable.

Revenue Ruling 54-429, 1954-2 Cum. Bull. 53, interpreting § 22(a) of the Internal Revenue Code of 1939, predecessor of § 61(a) of the 1954 Code, provides that an amount received as reimbursement by an employee from an employer for the expenses of moving himself, his immediate family, his household goods and personal effects from one official station to another for permanent duty is not includible in the employee's gross income. The Ruling then specifically provides that

> Amounts received as allowances or reimbursements for meals and lodging of the employee and his family while awaiting permanent quarters at the new post of duty are includible in gross income of the employee.

We think that this ruling is a permissible interpretation of the Internal Revenue Code's definition of gross income, and a correct one. The expense of transporting an employee to a new post of duty for benefit of the employer is properly an expense of the employer, not compensation to the employee, but the costs of meals, lodgings, and expenses incidental to securing housing at the post are personal living expenses of the employee, and if they are provided by the

employer, income is realized thereby. This question was resolved adversely to England in *Cockrell* v. *Commissioner*, 321 F.2d 504 (8th Cir. 1963), where the taxpayer received a per diem allowance from the employer at the new post and a special allowance to reimburse him for the cost of living in motels near the new post while attempting to find housing, scarce in the area. The Tax Court and the Eighth Circuit upheld the Commissioner's determination that the allowances were includible in the taxpayer's gross income and that they were not deductible as travel expenses while away from home.

Plaintiffs and the district court relied on *John E. Cavanaugh*, 30 [*sic*] T. C. 300 (1961), in support of the court's decision. The Government contends, and we agree, that that case was wrongly decided in failing to follow Rev. Rul. 54-429 and in excluding reimbursements for "extraordinary" post-arrival food and lodging expenses from gross income.

The district court here held that even if the amounts in question are includible in gross income, they are deductible either as ordinary and necessary business expenses under § 162(a)[3] or as reimbursed travel expenses while away from home in the pursuit of a trade or business, under §§ 62(2)(A)[4] and 162(a)(2).[5] A taxpayer's "home," for

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[3]Int. Rev. Code of 1954, § 162(a). "There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business. . . ."

[4]Int. Rev. Code of 1954, § 62(2)(A). "The deductions allowed by part VI (sec. 161 and following) which consist of expenses paid or incurred by the taxpayer, in connection with the performance by him of services as an employee, under a reimbursement or other expense allowance arrangement with his employer."

[5]Int. Rev. Code of 1954, § 162(a)(2). "traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business. . . ."

the purposes of the reimbursed travel expense deduction, is not necessarily the place of his residence. Rather, it is the place of the taxpayer's business. In this case Springfield clearly was England's "home" after the transfer, and expenses incurred there were not "away from home." *Commissioner* v. *Flowers,* 326 U. S. 465 (1946); *Cockrell* v. *Commissioner,* 321 F. 2d 504 (8th Cir. 1963); *Kalist* v. *Commissioner,* 321 F. 2d 508 (8th Cir. 1963); *Light* v. *Commissioner,* 310 F. 2d 717 (5th Cir. 1962); *Andrews* v. *Commissioner,* 179 F. 2d 502 (4th Cir. 1950); *Ney* v. *United States,* 171 F. 2d 449 (8th Cir. 1948); *York* v. *Commissioner,* 160 F. 2d 385 (D. C. Cir. 1947); *Darrell Spear Courtney,* 32 T. C. 334 (1959). No deduction for those amounts is allowable under §§ 62(2)(A) and 162(a)(2).

We think too that the district court's decision that these amounts were deductible as "ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business" under § 162(a) cannot be sustained. The expense of England's meals and lodging, his wife's trip, and the sale of his house were personal expenses, expressly made non-deductible by § 262. *Cockrell* v. *Commissioner; Light* v. *Commissioner; York* v. *Commissioner; Andrews* v. *Commissioner, supra.*

England relies on *Walter H. Mendel,* 41 T. C. 32 (1963), now on appeal before the Fourth Circuit, in support of his position that these expenses are deductible. That case, which the Government contends was wrongly decided, allowed deductions for unreimbursed expenses of transporting household goods and for hotels and meals in transit to the new post, which the Tax Court characterized as business expenses. In view of our decision that the expenses

involved here are personal expenses, *Mendel* is not directly in point and we need not express any opinion as to its correctness.

The judgment is reversed and the cause remanded with instructions to dismiss the complaint.

Appendix A

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60610

Thursday, April 29, 1965

Before

Hon. LATHAM CASTLE, *Circuit Judge*
Hon. ROGER J. KILEY, *Circuit Judge*
Hon. LUTHER M. SWYGERT, *Circuit Judge*

No. 14727

KENNETH D. ENGLAND and
CONNIE J. ENGLAND,
Plaintiffs-Appellees,

vs.

UNITED STATES OF AMERICA,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Illinois.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Illinois, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, and that this cause be, and it is hereby, REMANDED to the said District Court with instructions to dismiss the complaint, in accordance with the opinion of this Court filed this day.

APPENDIX B

Opinion of The District Court

UNITED STATES DISTRICT COURT

for the Southern District of Illinois

Civil No. 3220

Decided, February 27, 1964

KENNETH D. ENGLAND AND CONNIE J. ENGLAND,
Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant.

Poos, District Judge: This is an action for a refund of federal income taxes for the year 1960 in the amount of $103.00 plus interest, pursuant to Title 28, Section 1346 (a)(1) of the United States Code, and Section 7422 of the Internal Revenue Code of 1954. The Plaintiff taxpayer was permanently transferred by his employer from Kansas City, Missouri to Springfield, Illinois and preceded his family by six weeks, during which time he incurred certain living expenses, being unable to procure permanent living accommodations at an earlier date. These costs were reimbursed by his employer, Aetna Casualty and Surety Company and not reported as income by the taxpayers. The De-

fendant assessed a deficiency which was paid, and a claim for refund filed.

Plaintiffs contend that the reimbursement made to the taxpayer, Kenneth England, was for extraordinary business expenses required and incurred on behalf of his employer and not income, or in the alternate that the expenses in question were deductible as ordinary and necessary business expenses. The Government contends that the reimbursement constitutes taxable income.

The Plaintiff taxpayers, Kenneth D. and Connie J. England, husband and wife, were employed by Aetna Casualty & Surety Company; he, as an assistant chief auditor for a period of seven years, and she, as a clerk in the Kansas City, Missouri office. They had resided there for a period of seven years in a mortgaged home owned by them. The wife's salary was $4,200.00 annually. On May 19, 1960 an opening developed in the Springfield, Illinois office of the Aetna which the husband was qualified to fill. The General Manager of the Kansas City office requested him to transfer to Springfield. This transfer was not solicited by the husband. He had reasons to believe that he was in line to succeed to the chief auditor's position at the Kansas City office, if a vacancy occurred. Neither he nor his wife was desirous of making the change. He was asked to report to Springfield on June 1st, but on his request was allowed some additional time. The husband, in fact, arrived in Springfield on June 19, 1960. At the time of transfer, his salary was increased $750.00, $250.00 of which was a merit raise. No arrangements were made for the wife's re-employment by Aetna. There were various pressures on the husband to accept the transfer, chief of which was that a refusal would have ruined any chance of future advancement and another was

the displacement of family living conditions. There were also pressures on him to decline the transfer, chief of which was the necessity to sell his Kansas City home and to locate a home in which to live at his transferred location.

He made his first trip to Springfield on May 23, 1960 to interview Al Chunis, whom he was succeeding, the General Manager, and the other employees with whom he would be working at the Springfield office. At this time he made inquiries concerning new living quarters. He returned to Kansas City where it was determined that his date for the Springfield assignment was to be July 1, 1960. He next returned to Springfield on June 20, 1960, when he entered on his new duties. At this time he commenced looking for a place to live and on July 9, 1960 signed a lease to commence August 1, 1960. Prior to the execution of the lease, the wife came to Springfield to inspect two houses that were under consideration, and she selected the one at 2835 South Lincoln, which was subsequently leased and to which their furniture was moved from Kansas City. The premises were not available before August 1, 1960, because the owner could not surrender possession earlier.

On June 27 of the same year the husband received a phone call concerning the sale of the Kansas City house from a real estate agent who asked that he take a price slightly below the asking price. He confirmed the lower price by wire. The expense of this wire, among others, is part of the expense claimed in the suit. The husband made trips from Springfield to Kansas City on two weekends to make final arrangements for the sale of his Kansas City home, and for the purpose of bringing personal property to Springfield. He also closed out bank accounts. It was during these two trips that all Kansas City ties were severed.

Appendix B

Between June 19th and August 1st, 1960, the transition period between job locations, he incurred certain expenses totaling $446.00,[1] for which his employer, Aetna, reimbursed him. Aetna, because of the nationwide nature of its business, has a defined program for reimbursement to its employees of expenses incurred in job transfers, and has printed instructions covering these expenses. The company recognizes that employees who are asked to transfer suffer financial loss because of traveling and duplicated living expenses. The employee is required to submit an itemized expense account. The husband taxpayer submitted his expense account to AEtna, and was paid the above amount.

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[1]The itemized expense account for the week of June 19th through June 25th includes the following items: motel room expense, $24.00; reimbursement to friend for use of apartment, $12.00; meals, $30.15; telephone confirming motel reservation, $1.50; total amount, $67.65. For the week of June 26th through July 1st includes $16.00 reimbursement to friend for use of apartment for four days; meals, $18.80; telegram to Kansas City confirming sale of house, $1.38; newspaper ad to rent house, $10.73; dinner and entertainment for departing auditor, A. P. Chunis, $7.00; laundry, $2.60; and cleaning, $0.80; total amount, $57.31. For the week of July 5th through July 9th includes motel room expense, $28.00; meal expense, $23.75; and during the same period for the wife's expense trip from Kansas City to Springfield to inspect the contemplated house for living quarters in Springfield: railroad travel expense, $59.18; taxi fare, $1.25; motel room for two days, $10.00; and meals, $12.65; total amount, $134.83; for the period of July 10th through July 16th includes motel expense, $24.00; meal expense, $21.40; telephone expense, $0.80; laundry, $6.56; and cleaning, $4.40; total amount, $57.16; for the period of July 17th through July 23rd includes motel room expense, $42.00; meal expense, $31.95; cleaning expense, $1.60; total amount, $75.55 and for the period of July 24th through August 1, includes motel room, $20.50; meal expense, $24.80; board of dog and cat, $3.50; bring title to date, $50,00; revenue stamp, $3.30; total amount, $102.10. The totals for the entire period amounted to $494.60 from which the Aetna disallowed $41.77 as excessive under its rules, leaving an allowable expense claim of $452.83, but the parties have agreed upon $446.00 for the purposes of this action.

This allowance is limited to $50.00 for a seven-day week. The taxpayers, at the time of filing their 1960 tax return, did not include this allowance as income. The taxpayer spent more than the $446.00 reimbursed them in making this move at AEtna's request and direction. Taxpayer's overall financial condition was not improved by virtue of this $446.00 payment. This move was, in a number of ways, an expensive one for the taxpayers. They had to sell their Kansas City house on which they were repaying a mortgage at a cost to them of $835.00 for real estate selling commissions. They had to pay July interest amounting to $51.38 covering the period of the move from Kansas City, Missouri to Springfield, Illinois; they had to pay one-seventh of the State and County Taxes for the month of July amounting to $13.25; they had to pay one-seventh of the city and park taxes for the month of July amounting to $3.26. Revenue stamps on the deed of conveyance of their property amounted to $3.50, and they paid a title policy fee of $77.85. All of these unreimbursed expenses were occasioned by the move. In addition, the wife had a salary loss of $775.00, and the laundry could no longer be done as in Kansas City by the wife's mother at no cost. Thus, this move was an expensive one to taxpayers, without reimbursement for some of the items.

The Director of Internal Revenue, on audit of taxpayers' return, added the reimbursed expenses of $446.00 to gross income, and assessed an additional tax amount to $103.00.[2] This amount was paid under protest, a claim for refund was filed, and was denied by the Government.

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[2]The above sum of $446.00 was held to be reportable as addition to gross income by the District Director in the following interpretation of the rulings and the statute:

> "Mr. England, an employee of the AEtna Casualty Company, was transferred by this employer from Kansas City,

Appendix B

The following provisions of the Internal Revenue Code are pertinent to the decision of this case:

"Sec. 61. Gross Income defined:

(a) General definition: Except as provided in this subtitled, gross income means all income from whatever source derived including (but not limited to) the following items:

(1) Compensation for personal service, including fees, commissions and similar items.

Sec. 62. Adjusted gross income defined:

For the purpose of this subtitle, the term 'adjusted gross income' means, in the case of an individual, gross income minus the following deductions:

Missouri, to Springfield, Illinois. The cost of moving his household goods was paid by the employer, and travel expenses of Mr. England and his family were either paid by the employer directly or reimbursed to Mr. England.

In addition to the travel and moving expense, the employer reimbursed Mr. England for certain living expenses while he was in Springfield, and his family was still in Kansas City. Such reimbursements, mostly for a motel, room and meals, totalled $446.00. . . .

2(b) Reimbursements for living expenses.

The facts regarding this issue are included in Item 2(a) above.

Revenue Ruling 54-429, supra, also provides 'amounts received as allowances or reimbursements for meals and lodging of the employee and his family while waiting permanent quarters at the new post of duty are includible in gross income of the employee'.

Therefore, it is held that the reimbursements of living expenses in the total amount of $446.00 as represents income to Mr. England, taxable under Section 61 of the 1954 Internal Revenue Code. It is further held that no part of the $446.00 may be deducted by the taxpayer under authority of Section 262 of the 1964 Internal Revenue Code."

Appendix B

(2) Trade and business deductions of employees.

(a) Reimbursed expenses: The deductions allowed by Part VI (sections 161 and following) which consist of expenses paid or incurred by the taxpayer in connection with the performance by him of services by an employee, under a reimbursement or other expense allowance with his employer.

(b) Expenses for travel away from home: The deductions allowed by Part VI (Sec. 161 and following) which consist of expenses of travel, meals, and lodging while away from home, paid or incurred by the taxpayer in connection with the performance by him of services as an employee.

(c) Transportation expenses: The deductions allowed by Part IV (Sec. 161 and following) which consist of expenses of transportation paid or incurred by the taxpayer in connection with the performance by him of services as an employee . . ."

Sec. 63. Taxable income defined.

(a) General rule. Except as provided in subsection (b) for the purposes of this subtitle the term 'taxable income' means gross income, minus the deductions allowed by this chapter, other than the standard deductions allowed by Part IV (Sec. 141 and following).

(b) Not applicable.

Sec. 161. Allowance of deductions. In computing taxable income under Sec. 63 (a), there shall be allowed as deductions the items specified in this part, subject to the exceptions provided in Part IX (Sec. 261 and the following) relating to items not deductible.

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Sec. 162. Trade or business expenses.

(a) In general. There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including:

(1) A reasonable allowance for salaries or other compensation for personal services actually rendered.

(2) Travelling expenses (including the entire amount expended for meals and lodging) while away from home in pursuit of a trade or business.

Sec. 211. Allowance of deductions.

In computing taxable income under Sec. 63(a), there shall be allowed as deductions the items specified in this part, subject to the exceptions provided in Part IX (Sec. 261 and following, relating to items not deductible.)

Sec. 261. General rule for disallowance of deductions.

In computing taxable income no deduction shall in any case be allowed in respect of the items specified in this part.

Sec. 262. Personal, living and family expenses.

Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal living, or family expenses.

The inquiry is twofold: First, was this payment an addition to gross income under Sec. 61, and, secondly, if so, could it be deducted in view of the injunction of Sec. 262

which forbids a deduction for "personal, living, or family expenses"?

Under Section 61, gross income is defined as "all income from whatever source derived, including (but not limited to) the following items:

> (a) Compensation for services, including fees, commissions and similar items."

The Government, in its argument, says "that it should be clear that the amounts involved herein represent gross income within the meaning of Sec. 61 of the Internal Revenue Code of 1954." It argues that gross income means all income from whatever source derived, and includes all kinds of compensation for services and further argues that this is an instance of undeniable accession to wealth clearly realized, and over which these taxpayers have complete dominion. These statements, while true in a general way, cannot be applied to the facts adduced by the evidence to include this reimbursement in the taxpayers' gross income under Sec. 61. This record shows that rather than an increase in wealth, the taxpayers in fact saw their financial situation worsened in carrying out the direct request of the husband's employer to make the move from Kansas City to Springfield. It is clear that financially they are worse off for having made the transfer than had they remained in the employ of Ætna in Kansas City, in so far as their immediate fortune is concerned. This payment cannot be considered income earned from an actual personal service. The evidence shows a detriment to wealth. Section 61 says that gross income means all income from whatever source derived including, but not limited to compensation for services, including fees, commissions and similar items. Nowhere

does Sec. 61 say that reimbursed extraordinary expenses directly related to a taxpayer's job, occurring by reason of a directed move by a superior to take another job in a different office of a vast enterprise, are income. In this temporary period of relocation, this money was not paid by way of reimbursement for services actually rendered. The employer's rules definitely state that these payments are made only because employees otherwise suffer a financial loss because of traveling and duplicated living expenses arising from a transfer. They limit an employee's reimbursement to his actual expenses which are not, however, to exceed $50.00 weekly.[3] The evidence here shows that, in fact, the amounts expended for the items involved in the reimbursement was actually greater than the allowance, without even taking into consideration the $835.00 paid by the taxpayers for real estate sales commissions and the other items they paid such as taxes and interest noted above, all of which decreased their accumulated wealth. The taxpayers' net worth for the taxable year 1960 shows an actual reduction rather than an accession to wealth as claimed by the Defendant.

It is clear that the intention of the statutes, when the Internal Revenue Code is read as a whole, would exclude the items here in dispute from gross income. The interpretation of the statute argued for by the Government, would have the effect of placing a tax on the plaintiffs for what was in fact an actual loss to them.

The result reached in the case of *John E. Cavanagh* 36 T. C. 300, (5/18/61), which involved an analogous fact situation, is equally applicable here. The Government there

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[3]Employer's instructions are contained in the Appendix to this Opinion.

claimed that a tax was due it for failure on the part of a taxpayer to include $280.00 as living expenses for two weeks for which he was reimbursed by his employer. The $280.00 was held by the Tax Court to be non-compensatory and thus not includible in gross income under Sec. 61. The Court said the expenses were not *normal* expenses of the employee within the meaning of Sec. 262 but that these expenses were *extraordinary* living expenses attributable to the employer's having transferred him. The Court said:

> "There is no provision of the Internal Revenue Code of 1954 specifically requiring the inclusion in gross income of such payments as those here involved nor is there any provision specifically providing for the exclusion or deduction thereof. There is, however, a ruling by respondent with respect to the exclusion from gross income of transportation expenses paid by an employer to or in behalf of an employee where such transportation is required for the convenience of the employer, *Revenue Ruling* 54-429, C. B. 1954-2, 53, wherein respondent has ruled, in part, as follows:
>
> "Accordingly, it is concluded that (1) amounts received by an employee from his employer representing allowances or reimbursements for moving himself, his immediate family, household goods and personal effects, in case of a transfer in the interest of his employer, from one official station to another for permanent duty, do not represent compensation within the meaning of Section 22(a) of the Code, and are not includible in the gross income of the employee if the total amount of the reimbursement or allowance is expanded for such purposes * * *.

Appendix B

"With the exception hereinafter discussed, we think the above ruling is sound and has persuasive effect here."

"With respect to the $280.00 reimbursement to petitioner of his excess cost for the food and lodging of his family while his household effects were in transit, the following language from the above-cited ruling is claimed by respondent to prevent the exclusion thereof from income:

"Amounts received as allowances or reimbursements for meals and lodging of the employee and his family while awaiting permanent quarters at the new post of duty are includible in gross income of the employee. (Rev. Ruling 54-429, supra, 54.)

"We agree that to the extent such reimbursements defray the ordinary and necessary food and lodging costs of an employee they represent payment of an *employee's* living expense and are income to him, but to the extent such reimbursements defray only reasonable and necessary extraordinary food and lodging expense required to be incurred by the employer, they represent repayment to the employee of an amount he has first paid for and in behalf of his employer and do not constitute income to him. They are the employer's costs, not the employee's. To the extent the above ruling would require the inclusion in income of reimbursement for such extraordinary *food and lodging* costs, it is not a correct interpretation of Section 22(a) or Section 24(a) of the 1939 Code or Sections 61(a) and 262 of the 1954 Code. The prohibition against the deduction of personal living expenses has reference only to such

expenses as are ultimately chargeable to the taxpayer. It has no applicability to such expenses properly chargeable to another which the taxpayer pays and for which he is reimbursed."

Likewise, in the instant case, the expenses here in question were of an extraordinary nature required to be incurred by the employer and repaid by it. Such expenses were the employer's costs and not the employees.

The tax Court has recently cited its decision in the *Cavanagh* case with approval. *Walter H. Mendel,* 41 T. C. No. 4, (October 10, 1963).

If it is conceded (and the Court finds to the contrary) that this reimbursement should be included in gross income under Section 61, the Government then argues that no deduction can be taken for these reimbursed expenses because of the provisions of Section 262. This section provides that, except as otherwise provided, no deduction shall be allowed for "personal, living, or family expenses." In our view of the evidence, these expenses, which were reimbursed to the taxpayers to prevent them from sustaining further economic loss because of the duplication of living expenses during the transition period, were not non-deductible "personal, living, or family expenses." The facts before the Court show that these moving expenses were incurred while the husband was away from home in the pursuit of his trade or business and were incurred in connection therewith.

The disallowance of Section 262 is not in all events and such expenses are allowable if otherwise provided for. In our view, such an allowance is provided by Section 62(a)(A).[3] This section permits employees a deduction from

[3]Section 62(2)(B) which might otherwise be applicable does not apply here since that section does not apply to reimbursed expenses.

gross income of certain reimbursed amounts if these amounts (1) are allowable under Part VI (Sections 161-182) of subchapter B of the Internal Revenue Code (2) were paid in connection with the taxpayer's performance of services as an employee, and (3) were paid under a reimbursement or other expenses allowance with his employer. We think that the facts found here show that all three of these tests are met. There is no question that those items were reimbursed by the husband's employer under a reimbursement arrangement with his employer. Since these reimbursed expenses arose out of the transfer of the husband from one office of his employer to another, the necessary connection with the performance of services is present. Finally, we hold that these expenses would be deductible under Section 162(a) as an ordinary and necessary expense in carrying on the husband's trade or business of performing services for Ætna as an employee. While we would characterize these expenses as traveling expenses within the meaning of Section 162(a)(2), if that characterization is incorrect, we feel that these expenses would still be ordinary and necessary under the broad allowance of Section 162(a). The requirements of Section 72(2)(A) are thus satisfied such that Section 262 has no application to the facts of this case.

That these expenses are of a kind which may be deducted under Sec. 162(a) is clearly indicated by the case of *Walter M. Mendel,* op. cit., which allowed a deduction for the unreimbursed portion of certain moving expenses. Although the items of expense involved in that case differ from those in the present case, the Tax Court clearly indicated that all expenses incidental to a taxpayer's move made at the request of and for the benefit of his employer are deductible if necessary to accomplish the move. Likewise, in this case

a fair construction of the facts show that the transfer of the taxpayers was at the request of and for the benefit of the employer, who needed a replacement for auditor Chunis who for personal reasons had requested an immediate transfer to Boston, and the transfer was accepted by Plaintiff, Kenneth D. England, for the benefit of his employer rather than himself. It was contended in that case that the expense of moving the taxpayer's wife and household effects were personal expenses and not business expenses. The Court reaffirmed the *Cavanagh* case, supra, and said:

> "If amounts expended by a taxpayer in moving from one permanent post of duty to another are not personal expenses, they are for the purpose of the taxpayer's business as an employee since the cause of the move is business requirements. Ordinary and necessary business expenses are deductible by an employee who itemizes his deductions on his income tax return. . ."
>
> "The clear inference from our holding in *John E. Cavanagh,* supra, is that the entire amount of the expenses paid by an employee in moving from one permanent duty station to another is deductible to the extent that the amount expended is ordinary and necessary to accomplish the move and that this may be accomplished either by not including the reimbursed amount in income or by including the reimbursed amount in income and deducting the total amount expended. In the instant case, it appears from the record that petitioner has not included the $316, which he received from the Veterans Administration as reimbursement for his moving expenses in his 1957 income as reported."

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Accordingly, the facts as above set out are found to be the facts in this case, and the law as hereinabove set out are the conclusions of law, and accordingly are hereby adopted as the findings of fact and conclusions of law, and under them judgment is ordered for the plaintiff in the full amount as prayed with interest, and the final judgment figures to be entered are to be determined by the parties hereto.

Appendix B

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INSTRUCTIONS OF
AETNA CASUALTY AND SURETY COMPANY
TO
EMPLOYEES MOVED AT COMPANY'S EXPENSE

It is the company's intent that employees, who are asked to transfer, not suffer a financial loss because of traveling and duplicated living expenses. Correspondingly, it is expected that any such employee will give full consideration to the company's interests and arrange his affairs so as to keep expenses incurred by a transfer to a reasonable minimum.

The following instructions, contained in paragraphs 1 through 6, apply only to married men, or single men who are the head of a household:

1. It is expected that a transferred employee, when reporting to the new location, will not bring his family with him unless prior permanent or semi-permanent (not hotel) accommodations have been arranged.

2. He may spend not more than one week at a hotel after which time it is expected that he will rent a room on a reasonable weekly basis.

3. After not more than one week at a hotel and until he brings his family to the new location, he will be allowed to submit expense accounts for out-of-pocket expense not to exceed $50 per seven day week. This is not a flat allowance and it must be itemized. This allowance includes room, meals, laundry, etc. Also, if there is a weekly trip home (par. B9A) the cost must be included under the $50. allowance. This allowance will not be continued beyond 90 days

from the date of reporting to the new location without prior approval of the H.O. Department which arranged the transfer.

4. If he owns his home in the old location, he should arrange to place it on the market for sale. It will probably not be possible for him to move his family to the new location until his home in the old location has been sold. However, he should begin looking over the housing situation in the new location so that when his home in the old location is sold he will have a fairly good knowledge of conditions in the new location.

5. After he has investigated the housing market in the new location, he probably will want his wife to come for a few days to look at specific properties and the cost of this will be at company expense. It is expected that she would not have to make more than one trip to the new location before moving. In any event, only one inspection trip will be reimbursable under this program.

6. Since he owns his home in the old location, he may want to buy again in his new location. Or, if suitable rental accommodations can be found, he may prefer to rent for a while before buying. In any event, expense reimbursement will cease as soon as he moves his family to permanent quarters in the new location, or within 90 days, whichever first occurs. It may be necessary to have his family stay at a hotel for a day or two after arrival in the new location; but this should be kept to a minimum.

NOTE: In the event the transferee does *not* own his home the following instructions supersede paragraphs 4, 5, and 6.

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As soon as possible after arrival in the new location he should begin looking for a place to live. After he has investigated the housing situation he will probably want his wife to come to the new location to look at specific properties, and the cost of this will be at company expense. It is expected that she would not have to make more than one trip to the new location before moving. In any event only one inspection trip will be reimbursable under this program.

Expense reimbursement will cease as soon as he moves his family to permanent quarters in the new location. It may be necessary to have his family stay at a hotel for a day or two after arrival in the new location, but this should be kept to a minimum.

7. In the case of a single man, not head of a household, living costs at the new location will be paid for a period not to exceed one week during which period the employee is expected to make permanent housing arrangements, after which expense reimbursement will cease.

8. The company will reimburse employees for transportation costs incurred for transfer from one location to another as follows:

A. If public transportation is necessary, reimbursement will include charges for fares on plane, train or bus, for the most direct route. Reasonable expenses customarily associated with travel, such as meals enroute, tips, cabs or limousines will also be reimbursed.

B. If an employee uses his own car as the means of transportation the company will permit mileage allowance at the rate currently in force for the most direct route. In

addition, reasonable expenses enroute such as hotels, parking, tolls, meals and tips will be reimbursed.

C. Unless instructed to do otherwise employees who have a company leased car assigned to them should use this car as a means of transportation when transferred. Expense reimbursement will be in the same manner as any other trip made for business purposes. Miles driven beyond the most direct route will be considered as personal miles.

D. If a transferred employee has more than one car in his family and they are owned by him or his family, the company will permit mileage allowance at the rate currently in force for the most direct route for all cars. Employees in this category should make use of the cars so as to avoid any necessity of using other means of transportation for moving the family to the new location.

9. It is the company's desire when men are being transferred to disturb the family relationship as little as possible. Accordingly, married men and single men who are the head of a household may be permitted to return home for week-ends prior to moving their families to the new location subject to the following conditions:

A. In some cases distances will be relatively short between the new location and the old location. If the cost of transportation home each week-end is equal to or less than the cost of maintaining the transferee over the week-end at the new location he should normally return to his home each week-end. Factors involving leaving time on Fridays and arrival time on Mondays should be considered.

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B. In cases not covered under 9A the transferee will be permitted to return home at company expense every three weeks, provided the distance involved is reasonable enough to justify this frequency.

10. An employee will be reimbursed for transportation costs of moving his immediate family to the new location on the same basis as for himself. For the purpose of defining immediate family, it shall include members of the household of his principal residence.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 603

KENNETH D. ENGLAND AND CONNIE J. ENGLAND,
Petitioners

v.

UNITED STATES OF AMERICA, *Respondent*

BRIEF AMICUS CURIAE OF THE ELECTRONIC INDUSTRIES ASSOCIATION IN SUPPORT OF PETITIONERS

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BRIEF AMICUS CURIAE OF THE ELECTRONIC INDUSTRIES ASSOCIATION IN SUPPORT OF PETITIONERS

Pursuant to Rule 42 of the Supreme Court of the United States, the Electronic Industries Association respectfully files this brief *amicus curiae* in support of the Petition for a Writ of Certiorari filed in behalf of Kenneth D. England and Connie J. England in the instant case. Both counsel for Petitioners, Kenneth D. England and Connie J. England and counsel for the Respondent, the United States of America have given their consent to the filing of this brief.

QUESTIONS

Whether an employee who is transferred to a new job location by and at the direction of his employer must include in gross income amounts received from his employer in reimbursement for extraordinary moving expenses necessarily incurred by the employee solely as a result of his job transfer. Alternatively, if the employee must include such reimbursed expenses in gross income, whether the employee is entitled to deduct such expenses as ordinary and necessary business expenses.

INTEREST OF AMICUS CURIAE

The Electronic Industries Association (hereinafter referred to as EIA) is a major trade association, headquartered at 1721 DeSales St., N.W., in the District of Columbia. It represents nearly 300 domestic electronic manufacturers. It is the national association representing the fifth largest manufacturing industry in the United States, with gross annual sales in excess of $15 billion. The manufacturers in this industry alone employ over 875,000 people. In the calendar year 1964 17,500 of these employees were transferred by their employer from one domestic manufacturing facility to another. This represents 2% of the employees in this industry and an increasing trend in the electronics field.

There have been few cases presented to this Court concerning income taxation which have been of importance to so many individual taxpayers, as well as to many corporations large and small.

ARGUMENT

The EIA has read the decision of the United States Court of Appeals for the Seventh Circuit in this case and agrees with the petitioners that a writ of certiorari should be granted.

The Internal Revenue Service makes an illogical distinction between certain of an employee's moving expenses, i.e., travel and transportation on the one hand, and other expenses directly related to the move on the other. There is no basis in fact or law for this distinction. The many types of expenditures involved in employee moves should be treated similarly for tax purposes to the extent that they are reasonable.

CONCLUSION

It is respectfully submitted that (1) to bring a needed consistency to the tax treatment of moving expenses and (2) to aviod clogging of Federal Court calendars with a spate of litigation, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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